UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/2000/NGO/88
11 February 2000

ENGLISH
Original: SPANISH

COMMISSION ON HUMAN RIGHTS
Fifty-sixth session
Item 13 of the provisional agenda

RIGHTS OF THE CHILD

Written statement* submitted by the American Association of Jurists,
a non-governmental organization in special consultative status

The Secretary-General has received the following written statement, which is circulated in accordance with Economic and Social Council resolution 1996/31.

[16 December 1999]

* This written statement is issued, unedited, as received from the submitting non-governmental organization.

Draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

I. The working group on a draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography appears to be at a standstill as a result of the discussion on the coverage of its mandate.

II. The American Association of Jurists (AAJ) pointed out at the first session of the Working Group in November 1994 that its mandate derived from paragraph 17 of resolution 1994/90, which refers to guidelines for a possible draft optional protocol ... on the sale of children, child prostitution and child pornography, as well as the basic measures needed for their prevention and eradication. It took the view that the mandate had to be interpreted within the whole context of the Commission's resolution, which mentioned, inter alia, the Vienna Declaration and Programme of Action, in which reference is made to the sale of children and their organs (Vienna Declaration and Programme of Action, I.21).

III. The AAJ went on to point out that the Group's mandate was wide-ranging, since it had to concern itself with the sale of children whatever the purpose, that is to say, whether it was for sexual or economic exploitation, for the sale of their organs or for their illegal adoption, and also obviously had to deal with child pornography and the basic measures for the prevention and eradication of these offences. In the opinion of the AAJ, it could not be maintained that the Working Group's mandate did not include fraudulent adoption and the traffic in organs.

IV. This matter had not been decided and in the Group's debates there were still States that wanted to include both subjects and other States that were opposed. It was even maintained, as an argument for not including the traffic in organs, that it had not been proved that such a traffic existed. However, there are many reasons for asserting that this subject cannot be omitted: legislation in many countries treats the sale of organs as a criminal offence; the Assembly of the World Health Organization approved in May 1989 a resolution (WHA42.5) on the prevention of the sale of human organs for transplantation, which specifically referred to children and other vulnerable groups; in 1991 the same Organization approved Guiding Principles on Human Organ Transplantation; and in 1993 the European Parliament approved a resolution on prohibiting trade in transplant organs.

V. A report of the Secretary-General of the United Nations in 1995 entitled "Organ Transplant" (E/CN.4/Sub.2/AC.2/1995/6), which was prepared for the Working Group on Contemporary Forms of Slavery of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, contained information provided by the United Nations Office at Vienna, which is quoted "in extenso" below. After pointing out that, in its resolution 3/2 entitled "International Traffic in Minors", the Commission on Crime Prevention and Criminal Justice, based in Vienna, had decided that the international traffic in minors should be considered in the context of the discussion of the question of organized transnational crime, the statement went on to make the following points.

"Furthermore, the Secretary-General in his report on the impact of organized criminal activities upon society at large (E/CN.15/1993/3) noted that at present no country was able to meet the demand for organs adequately and waiting lists were growing at a faster rate than the

supply. For instance, an estimated 85 per cent of the patients accepted for dialysis in Ireland received transplants in the first year, whereas in the United States only about 25 per cent of such cases resulted in transplants and in Japan the figure was less than 10 per cent. In the United States alone, statistics indicated that as of June 1991, 24,000 people were on waiting-lists for transplants. In Australia, the number of people requiring kidney transplants was about 2,000 at the present time, with about 400 transplants performed each year. The average waiting time for such a transplant was three years. This was a situation which organized crime was bound to exploit, as resort to exploitative and criminal practice could generate high profits where the number of available organs was insufficient. The Director of the Australian Institute of Criminology was quoted as saying, 'Not surprisingly, a black market ... has developed in which organs fetch high prices'." The report from the United Nations Office at Vienna continues: "The large number of destitute and homeless persons, including children, found in urban areas, particularly in developing countries, provide a source of such transplant organs. The black market is bound to grow as technological advances extend the preservation of organs after removal, so that transport can be provided over long distances." In any event, even if such a traffic did not actually exist, it would not therefore cease to be a crime. It is as if a country where no murders were committed were to delete the corresponding crime from its penal code.

VI. At the meeting of the Working Group in February 1997, the AAJ reiterated its view that the criminal activities with which the draft optional protocol is concerned, in particular the international traffic in children, whatever its purpose, and sex tourism involving minors, should be classified as international crimes, firstly, because the iter criminis is normally cross-frontier and, secondly, because the offending conduct violates legal assets recognized by the international community as being fundamental, such as the life, physical well-being and dignity of the human person. More specifically, the AAJ maintained that the draft optional protocol should include the following offences, which should be classified as international crimes:

(a) The traffic in and/or sale of children, particularly for their economic or sexual exploitation, for their unlawful adoption or for purposes of removing from them organs, tissues or body material;

(b) Promoting or facilitating the prostitution or corruption of children;

(c) Using children for performances or the production of pornographic objects or visual or auditory material.

The expression "traffic in and/or sale" of children has been employed, because what characterizes the unlawful act is not the existence of pecuniary compensation, but the cession of a minor to a third party by those who have the legal care of the child, or the appropriation of a minor by a third party without the consent of the child's legal guardians, for purposes of economic or sexual exploitation, unlawful adoption or the removal of organs, tissues or body material. Accordingly, the AAJ proposed to the Working Group that the words "traffic in and/or" should be added before the word "sale", or in place of traffic, the word "trade".

With regard to the offence of promoting, facilitating or organizing child prostitution, the AAJ suggested to the Group that in the expression "performance of sexual acts" by the child

the words "or sexually significant" should be inserted before "acts", so that the offence would include acts that some national laws do not regard as sexual acts, but whose sexual significance is obvious and which produce serious damage to the child's psychological health.

VII. The American Association of Jurists also insisted that it should be made clear in the draft text that this offence, as in the case of child pornography, remained as such even though there was real or presumed consent on the part of the child, and even when he or she had reached the age of sexual consent according to the respective national legislation in force.

VIII. The American Assocation of Jurists also stated that the economic exploitation of children must be understood as being work by children carried out in violation of the International Labour Conventions, including forced labour and, in particular, those conventions that apply specifically to children, such as ILO Minimum Age Convention (No. 138).

IX. The American Association of Jurists argued in favour of the inclusion of the two purposes in the traffic of children that encountered most resistance in the Working Group: unlawful adoption and the extraction of organs, tissues or body material.

The American Association of Jurists considers it essential that the Commission on Human Rights should at this session adopt a resolution specifying that the working group's mandate covers the sale of or trade in children for whatever purpose, including unlawful adoption and traffic in organs, tissues or body material, so that the work of the group can progress and achieve its objective of a draft optional protocol.

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